UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CHINESE AUTOMOBILE DISTRIBUTORS OF AMERICA, LLC, a limited liability company, individually and, with respect to certain claims, in a derivative capacity,

Plaintiff,

v.

MALCOLM BRICKLIN, an individual; JONATHAN BRICKLIN, an individual; BARBARA BRICKLIN JONAS, an individual; MICHAEL JONAS, an individual; SANIA TEYMENY, an individual; SCOTT GILDEA, an individual; and VISIONARY VEHICLES, LLC, a limited liability company;

Defendants.

07 Civ. 4113 (LLS)

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT GILDEA'S MOTION TO DISMISS

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Plaintiff Chinese Automobile Distributors of America, LLC ("CADA") respectfully submits this Memorandum of Law in opposition to Defendant Scott Gildea's motion to dismiss the Complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure ("Federal Rule") 12(b)(1) and 28 U.S.C. § 1367, and Federal Rules 12(b)(6) and 9(b).[1]

PRELIMINARY STATEMENT

CADA brings this action to recover for its now worthless investment in Visionary Vehicles ("VV"), resulting from the corporate theft and malfeasance for which Defendant Scott Gildea ("Gildea") is partially liable. At all times relevant to this action, Gildea was the corporate accountant for VV. Gildea was responsible for maintaining VV's corporate books and records, all of which evidence corporate looting and reveal questionable accounting procedures. Although Gildea was an active participant in this fraudulent scheme, he now seeks to avoid responsibility for his misconduct by moving to dismiss. Specifically, Gildea argues that the Court lacks subject matter jurisdiction because CADA's state law claims substantially predominate over its federal claim, and Gildea further argues that CADA failed to plead its claims with adequate specificity. Gildea is wrong.

STATEMENT OF FACTS

Plaintiff CADA is a pre-eminent automobile dealership that is owned by Bruce and David Rothrock (together, the "Rothrocks"). Complaint ¶ 2. CADA invested a total of $4 million with VV, which was formed for the purported purpose of partnering with Chinese automobile manufacturers to provide North American consumers with luxury vehicles at a price substantially less than the price of comparable European and Asian luxury cars. *Id.* ¶¶ 3-4, 13.

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[1] References to the "Complaint" are to the Complaint filed by CADA on May 24, 2007, a copy of which is annexed as Exhibit A to the Declaration of Stephen Jacobs, Esq., dated August 2, 2007, and submitted in support of Defendant Gildea's motion to dismiss.

CADA made such investments based upon representations that Bricklin made to the Rothrocks concerning the status of VV's joint venture with Chery Automobile Co. ("Chery"). *Id* ¶ 20. As the Rothrocks later learned, these representations by VV's founder, Malcolm Bricklin ("Bricklin") were false. *Id.* ¶ 22. In fact, VV needed additional funding because Defendants engaged in corporate malfeasance and self-dealing. *Id.* ¶ 26.

As VV's corporate accountant, Gildea played an integral role in this fraudulent scheme. *Id.* ¶¶ 9, 26. A review of VV's books and records, for which Gildea was responsible, reveals the following examples of questionable activity:

- Over $250,000 in cash was withdrawn from company cash accounts between 2004 and September 30, 2006, without sufficient documentation to support such withdrawals.
- VV made payments of $4.9 million in transactions related to Malcolm Bricklin, personally.
- Other significant payments were made to entities controlled by Malcolm Bricklin's family members (Jonathan Bricklin and Barbara Bricklin Jonas) and his companion (Sania Teymeny).
- Over $130,000 was spent for "promotional gifts and materials" from 2004 to September 30, 2006, without explanatory documentation.
- VV's expenses were increased by approximately $800,000 in December of 2005, without sufficient documentation to support this transaction.
- Approximately $206,000 was spent on questionable purchases and service fees categorized as "Wellness."
- Several VV employees used their corporate American Express cards in a variety of suspect transactions, without documentation or explanation, including the purchase of a bicycle for $3,990.
- Over ten percent of all investment money raised was diverted to an account controlled by Bricklin.

Id. ¶ 26.

As a result of Defendants' looting of VV, and the failure by Bricklin and VV to complete its deal with Chery, CADA's entire investment became worthless. *Id.* ¶¶ 21, 27, 30, 39-40. Consequently, CADA brought this action alleging, among other things, that Gildea and other Defendants are liable for aiding and abetting the fraud committed by Bricklin, misappropriation of corporate funds, and corporate waste. *Id.* ¶¶ 32-35 and 41-50.[2] Gildea responded by moving to dismiss those counts, pursuant to Federal Rules 12(b)(6) and 9(b), arguing that the Court lacks subject matter jurisdiction and that CADA fails to plead a claim with adequate specificity. MTD at 1.[3] CADA now opposes that motion.

ARGUMENT

The purpose of a Federal Rule 12(b)(6) motion to dismiss "is merely to assess the legal feasibility of the complaint, not to assay the weight of evidence which might be offered in support thereof." *Ruskin v. TIG Holdings, Inc.*, No. 98 Civ. 1068 (LLS), 2000 WL 1154278, at *3 (S.D.N.Y. Aug. 14, 2000) (quoting *Ryder Energy Distributions Corp. v. Merrill Lynch Commodities, Inc.*, 748 F.2d 774, 779 (2d Cir. 1984)). Thus, when deciding a motion to dismiss, "[f]actual allegations made in the complaint are assumed to be true, and all inferences are drawn in favor of the plaintiff. Only if it appears to a certainty that a plaintiff could have proved no set of facts to sustain a claim for relief should the claim have been dismissed." *Ruskin*, 2000 WL 1154278, at *3 (quoting *Press v. Chemical Inv. Servs. Corp.*, 166 F.3d 529, 534 (2d Cir. 1999)). A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) is reviewed under

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2 CADA also asserts claims for fraud against Bricklin and VV (Complaint ¶¶ 28-31), violation of Section 10(b) of the Securities and Exchange Act of 1934 against Bricklin and VV (*id.* ¶¶ 36-40), and breach of fiduciary duty against Bricklin (*id.* ¶¶ 51-54).

3 References to the "MTD" are to the Memorandum of Defendant Scott Gildea in Support of the Motion to Dismiss, dated August 2, 2007.

the same standards as a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 128 (2d Cir. 2003).

I. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER THE CLAIMS AGAINST GILDEA.

For the reasons set forth in Plaintiff's memorandum of law in opposition to the Bricklin Defendants' motion to dismiss,[4] CADA has properly pleaded each of the elements of its claim that Bricklin and VV violated Section 10(b)(5) of the Securities and Exchange Act of 1934 and, therefore, this Court has original subject matter jurisdiction over that federal claim. 28 U.S.C. § 1331. Furthermore, the Court has supplemental jurisdiction over CADA's claims against Gildea because all claims arise out of the same common nucleus of operative fact and the federal and state issues are substantially intertwined. 28 U.S.C. § 1367(a).

By statute, a district court "shall have supplemental jurisdiction over all other claims that are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy...." 28 U.S.C. § 1367(a). The Court of Appeals for the Second Circuit has held that a district court's exercise of supplemental jurisdiction is mandatory over any claim that satisfies the requirements of 28 U.S.C. § 1367(a) unless the claim also falls within one of the exceptions numerated in § 1367(c). *Intar-Tass Russian News Agency v. Russian Kurier, Inc.*, 140 F.3d 442, 447 (2d Cir. 1998). *See also New York 10-13 Assoc. v. City of New York*, 1999 WL 177442, at *10 (S.D.N.Y. Mar. 30, 1999); *Nevares v. Morrisey*, 1998 WL 265119, at *8 (S.D.N.Y. May 22, 1998). Subsection (c) of 28 U.S.C. § 1367, which contains these exceptions to supplemental jurisdiction, provides as follows:

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[4] Defendants Malcolm Bricklin, Jonathan Bricklin, Barbara Bricklin Jonas, Michael Jonas, Sania Teymeny, and VV (collectively "Bricklin Defendants") moved to dismiss the Complaint for failure to state a claim pursuant to Federal Rule 12(b)(6). CADA filed a memorandum of law in opposition to the Bricklin Defendants' motion to dismiss on August 22, 2007 and hereby incorporates by reference all arguments contained therein.

> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if --
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Thus, in the Second Circuit, the supplemental jurisdiction analysis has two steps. "First, the court must 'identif[y] one of the factual predicates which corresponds to one of the subsection 1367(c) categories.'" *SST Global Technology, LLC v. Chapman*, 270 F. Supp. 2d 444, 456 (S.D.N.Y. 2003) (citing *Itar-Tass Russian News Agency*, 140 F.3d at 446). "Then, the court may exercise its discretion to determine whether to decline to grant supplemental jurisdiction; its decision should be informed by the values of judicial economy, convenience, fairness, and comity...." *Id.*

Application of the above statute to the Complaint reveals that none of the exceptions apply and, therefore, supplemental jurisdiction exists over these claims. Gildea focuses his attention on the second exception - where the state claims predominate over the federal claim; however, relevant precedent establishes that this second exception does not apply here.[5]

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[5] The first exception does not apply because the elements of CADA's state law claims of aiding and abetting fraud, misappropriation of corporate funds, and conversion do not raise novel or complex issues of state law that must be resolved by the State court. The third exception does not apply because, as fully articulated in Plaintiff's memorandum of law in opposition to the Bricklin Defendants' motion to dismiss, CADA has stated a federal claim -- violation of § 10(b)(5). The fourth exception does not apply because there are no "exceptional circumstances"

"State issues may predominate 'in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought.'" *SST Global Tech.*, 270 F. Supp. 2d at 456 (citing *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966)). However, the "substantially predominant" standard "is not satisfied simply by a numerical count of the state and federal claims the plaintiff has chosen to assert on the basis of the same set of facts" and an "analysis more sensitive to the relevant interests is required." *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 789 (3d Cir. 1995).[6] Courts in the Second Circuit have found that state claims predominate over federal claims "where the federal claims involve a technical or other issue that is peripheral to the state claims, ... and where the factual or legal analysis governing the federal and state claims are unrelated." *SST Global Tech*, 270 F. Supp. 2d at 456 (citation omitted).

SST Global Technology is a factually analogous case in which the Court examined the second exception and held that the state claims did not predominate over the federal claim.

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or "compelling reasons" for the court to decline jurisdiction. *SST Global Tech.*, 270 F. Supp. 2d at 459 (circumstance must be 'quite unusual'); *New York 10-13 Assoc.*, 1999 WL 177442, at *11 ("Because the factual basis for the federal and state claims is intertwined, there do not appear to be exceptional circumstances under subsection (c)(4) to warrant declining supplemental jurisdiction.").

6 *West Mifflin*, which Gildea cited (MTD at 11), lends support for CADA's claim that the Court should exercise supplemental jurisdiction over the state claims. In that case, which concerned the lower court's remand of the state claims, the court explained that "while we do not foreclose the parties from hereafter arguing, and the district court from hereafter considering, the issue posed by § 1367(c)(2), we think it unlikely that either will be able to point to a countervailing interest that would justify bifurcating this case into a federal and state suit that will essentially duplicate each other." *West Mifflin*, 45 F.3d at 790. Additionally, other cases that Gildea cited (MTD at 9, 11) are easily distinguishable and do not support his claim that the Court should not exercise jurisdiction over the claims against him. *Herrick Co. v. SCS Communications, Inc.*, 251 F.3d 315 (2d Cir. 2001) concerned whether the court had subject matter jurisdiction to enforce a settlement where there was no proper federal jurisdiction over the initial lawsuit. In *Diven v. Amalgamated Transit Union Int'l & Local 689*, 38 F.3d 598, 602 (D.C. Cir. 1994), the Court of Appeals found that the lower court did not abuse its discretion in refusing jurisdiction over many state law claims where one, weak federal claim remained against a defendant with a loosely alleged connection to the events at issue.

In that case, an investor sued telecommunications corporations and individuals, alleging that it was fraudulently induced to invest by misrepresentations regarding a satellite communications license. *SST Global Tech.*, 270 F. Supp. 2d at 446. Specifically, plaintiff brought action for a violation of Section 10(b) of the Securities and Exchange Act of 1934, common law fraud, negligent misrepresentation, breach of (common law) fiduciary duty, and imposition of a constructive trust. *Id.* at 451. The Court examined *sua sponte* whether to extend supplemental jurisdiction over the state claims and found as follows:

> It is apparent that in the case at bar the events underlying both the federal claim and the state claims are the same. Additionally, the federal claim and the state claims present closely similar inquiries, a central part of which will involve the issue of whether defendants misrepresented the status of the FCC license and the results thereof. Thus, it is clear that the federal claim in the present case does not involve a matter of mere tangential, technical, or peripheral relevance to the bulk and substance of the state claims; it is, instead, an additional federal cause of action arising from the "substantial interplay" between the federal claim and the state law claims.

Id. at 458 (citation omitted). Accordingly, the Court found that the state claims did not predominate over the federal claim.

As none of the aforementioned exceptions of 28 U.S.C. § 1367(c) apply to this case, the Court should exercise supplemental jurisdiction over the claims against Gildea. However, even if the court were to find that one of the exceptions applies, pursuant to the second step of the Court's analysis, the Court should not exercise its discretion to decline to exercise supplemental jurisdiction in the interest of "most sensibly accommodating the values of economy, convenience, fairness, and comity." *Intar-Tass*, 140 F.3d at 446. Under the circumstances, to decline jurisdiction would require the parties to segregate and litigate the same issues in different courts, resulting in duplicitous and wasteful litigation in disregard for judicial economy, and subjecting the litigants to the possibility of contradictory findings.

II. CADA HAS SUFFICIENTLY PLEADED ALL CLAIMS AGAINST GILDEA.

CADA alleges three causes of action against Gildea: aiding and abetting fraud, misappropriation of corporate funds and corporate waste. Each has been properly pleaded.

A. CADA Has Sufficiently Alleged Its Claim Of Aiding And Abetting Fraud.

To successfully plead a cause of action for aiding and abetting fraud, a plaintiff must show "(1) a fraud, (2) the defendant's 'actual knowledge' of the fraud, and (3) the defendant's 'substantial assistance' to the fraud's commission." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 292 (2d Cir.2006). CADA's Complaint satisfies each of these foregoing elements.

First, CADA has sufficiently alleged the existence of fraud. Under New York law, fraud has five elements: (1) the defendant made a material misrepresentation; (2) the defendant knew of its falsity; (3) the defendant possessed an intent to defraud; (4) the plaintiff reasonably relied on the misrepresentation; and (5) the plaintiff suffered damage as a result of the misrepresentation. *Kaye v. Grossman*, 202 F.3d 611, 614 (2d Cir. 2000). These elements overlap with the elements necessary to state a claim under Rule 10b-5. *See Leykin v. AT&T Corp.*, 423 F. Supp. 2d 229, 237-38 (S.D.N.Y. 2006). For the reasons fully articulated in Plaintiff's memorandum of law in opposition to the Bricklin Defendants' motion to dismiss, CADA satisfies all of the foregoing elements. Thus, the existence of fraud has been sufficiently plead, in compliance with the Rule 9(b) pleading standard.

Second, CADA has sufficiently alleged that Gildea had actual knowledge of the fraud. CADA alleged that the VV books and records revealed the following:

- An excess of $250,000 in cash was withdrawn from company cash accounts, made using ATM cards, and without sufficient supporting documentation;
- $4.9 million was paid to other entities in related transactions, and other significant payments were made to individuals related to Bricklin;
- Over $130,000 was spent on promotional gifts without explanatory documentation;

- There was an increase in expenses by $800,000 without explanatory documentation;
- $206,000 of VV expenses were categorized as "Wellness" without justification;
- Several charges were made on the American Express cards belonging to VV personnel without documentation or explanation.

Complaint ¶ 26. CADA also alleged that at all relevant times, Gildea served as corporate accountant to VV. *Id.* ¶ 9. Therefore, Gildea had access to and responsibility for the general ledgers, books, and records - i.e., the evidence of Defendants' corporate malfeasance and self dealing.

Gildea relies heavily on his assertion that CADA's allegations against him are based "upon information and belief." In fact, CADA alleged that "[u]pon information and belief, Defendant Scott Gildea is a resident of the State of New York" and that he "was responsible for, or participated in, the improper accounting." *Id.* Gildea's actual knowledge of the corporate malfeasance is not contradicted by the pleadings and the accounting irregularities set forth in the Complaint are not alleged upon information and belief.

Finally, CADA has sufficiently alleged that Gildea's actions provided substantial assistance to advance the commission of the fraud. In particular, CADA alleged, in great detail, how Defendants looted the company. Complaint ¶ 26. CADA further alleged that Gildea, as VV's corporate accountant, was responsible for maintaining the general ledgers and corporate records, and participated in the corporate malfeasance and questionable accounting procedures enabling Defendants to engage in such activity. *Id.* ¶ 9. Indeed, Gildea, in his capacity as VV's corporate accountant, increased VV's expenses by $800,000 without sufficient explanation or documentation, and Gildea is sufficiently tied to the fraudulent acts so that the Complaint adequately alleges that he was an active participant.

In sum, CADA has sufficiently alleged a cause of action against Gildea for aiding and abetting fraud. Therefore, Gildea's motion to dismiss Count Two should be denied.

B. CADA Has Sufficiently Alleged Claims Of Misappropriation of Corporate Funds and Corporate Waste.

CADA alleged that "Defendant Bricklin and the other Defendants engaged in corporate malfeasance and self-dealing including, without limitation" the numerous examples discussed *supra*. Complaint ¶ 26 (emphasis added). CADA further alleged that "[a]s a result of Defendants' action in, *inter alia* (a) making large cash withdrawals for unsubstantiated purposes, (b) using corporate funds for personal travel and entertainment, (c) paying related parties unreasonable fees in connection with consulting agreements, (d) making large expenditures for 'Wellness' absent appropriate corporate approval, (e) claiming large expenditures as 'promotional gifts' without sufficient justification for such expenditures, and (f) diverting ten percent of all investments to an unrelated account," Defendants have wasted significant corporate funds and assets and diverted the same to themselves. *Id.* ¶¶ 44, 49. Thus, Gildea's assertion that CADA's allegations focus solely on the Bricklin Defendants is incorrect. *See* MTD at 18. As CADA properly pleaded causes of action of misappropriate of corporate funds and corporate waste, Gildea's motion to dismiss Counts Four and Five should be denied.

CONCLUSION

For the foregoing reasons, CADA respectfully requests that the Court deny Defendant Gildea' motion to dismiss in its entirety, and grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
August 31, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2007, a copy of the foregoing Plaintiff's Memorandum of Law in Opposition to Defendant Gildea's Motion to Dismiss was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

Charles T. Lee [CL 5934]